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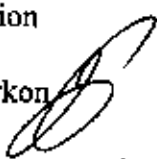
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July 20, 2000


**AGENDA ITEM**  
For Meeting of: 7-27-00

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Subject: Draft AO 2000-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 27, 2000.

Attachment

1 ADVISORY OPINION 2000-17

2  
3 Joseph A. Rieser, Jr.  
4 Reed Smith Shaw & McClay LLP  
5 1301 K Street, NW  
6 Suite 1100--East Tower  
7 Washington, DC 20005-3317

**DRAFT**

8  
9 Dear Mr. Rieser:

10  
11 This responds to your letter dated June 9, 2000, on behalf of Extendicare Health  
12 Services, Inc. ("Extendicare"), requesting an advisory opinion concerning the application  
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
14 regulations to the formation and administration of a separate segregated fund ("SSF" or  
15 "PAC") by a domestic subsidiary corporation that is wholly-owned by a foreign parent  
16 corporation.

17 Extendicare is a Delaware corporation with its principal place of business in  
18 Milwaukee, Wisconsin, and it is wholly owned by Extendicare, Inc., a Canadian  
19 corporation with its principal place of business in Ontario, Canada.<sup>1</sup> Through its wholly-  
20 owned subsidiaries, which are all United States entities, Extendicare operates 237 nursing  
21 and assisted living and retirement centers in 14 States with more than 25,000 people  
22 employed by either Extendicare or its domestic subsidiaries.<sup>2</sup> Extendicare provides home  
23 office management and administrative services for its operating subsidiaries that operate  
24 the cited nursing and retirement centers.

25 ***Factual background***

26 Extendicare's board of directors has changed from time to time in both size and  
27 composition over the years. Currently the board is comprised of three individuals, only

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<sup>1</sup> Extendicare is a wholly-owned subsidiary of Extendicare Holdings, Inc. ("Holdings"), a Wisconsin corporation with its principal place of business in Milwaukee. Holdings serves as the ultimate U.S. parent corporation, but its role is limited to that of a holding company: it has no operating assets and performs no management or administrative services. Holdings is a wholly-owned subsidiary of Extendicare International, Inc., a Canadian corporation, which, in turn, is a wholly-owned subsidiary of Extendicare, Inc., the top level parent corporation. The stock of this parent Canadian corporation is traded on the Toronto and New York Stock Exchanges.

<sup>2</sup> Extendicare's 1999 consolidated revenues from USA operations were over \$967 million, although its consolidated positive cash flow from operations that year was less than \$19 million. It had a consolidated loss for 1999, but had earnings in each of the preceding four years exceeding \$25.5 million.

1 one of whom is a US citizen. The other two are Canadian citizens who are not lawfully  
2 admitted for permanent residence in the United States, although they are lawfully  
3 admitted to the United States for both residence and work purposes. One of the Canadian  
4 directors is chair of the Extendicare board and is also deputy chair and CEO of the parent  
5 Canadian corporation. The other Canadian director is CEO of Extendicare and president  
6 of the parent Canadian corporation. The US citizen director is also the chief finance  
7 officer of both Extendicare and the parent Canadian corporation. The Extendicare  
8 president (not a board member) is a Canadian citizen who is not lawfully admitted for  
9 permanent residence in the United States. Of the remaining officers, a number are foreign  
10 nationals who do not have permanent resident alien status, and a number are U.S.  
11 citizens. In Extendicare's top management structure, there are board-elected officers,  
12 vice presidents who are not board-elected, and senior managers (with various titles and  
13 designations), hereinafter referred to as the "senior management team." Presently, the  
14 overwhelming majority of Extendicare's senior management team are U.S. citizens. One  
15 such official is Extendicare's vice president of government relations who is a United  
16 States citizen.

17 This vice president seeks Commission advice regarding whether Extendicare may  
18 establish and administer an SSF under the Act and Commission regulations that would  
19 solicit contributions from the eligible personnel of Extendicare and its subsidiaries who  
20 may lawfully make such contributions. The proposed SSF would make contributions to  
21 candidates for Federal and, perhaps (to the extent permitted under applicable State laws),  
22 State and local offices. In view of the foreign national status of two (out of three)  
23 members of Extendicare's board and given that its parent corporation is a foreign  
24 national, an approach for determining whether to establish an SSF is described. A plan of  
25 operation for an SSF is also described in the event that one is formed.

#### 26 ***Special Committee proposal***

27 The request states and explains that Extendicare's board would establish a special  
28 committee (the "Special Committee"). This Special Committee would be comprised only  
29 of individuals who are U.S. citizens or permanent resident aliens residing in the United  
30 States. The Special Committee would be charged with the authority and responsibility to

1 determine whether it would be desirable and appropriate for Extendicare to establish an  
2 SSF under 2 U.S.C. §441b(b)(2). If it should determine that it would be desirable and  
3 appropriate for Extendicare to establish such an SSF, the Special Committee would also  
4 have the authority and responsibility to determine what individual or individuals (the  
5 "PAC Committee") would administer the fund. Subject to the requirement that the  
6 members of the PAC Committee both be employees of Extendicare or its subsidiaries and  
7 be U.S. citizens or permanent resident aliens residing in the United States, the Special  
8 Committee would have complete discretion in determining the size and composition of  
9 the PAC Committee. In particular, the Special Committee would not be required to  
10 appoint to the PAC Committee only those individuals who were members of the Special  
11 Committee; it would have the authority to appoint those individuals whom it deemed  
12 best, regardless of whether or not they were members of the Special Committee. To the  
13 extent that the PAC Committee needs by-laws by which to govern itself, the Special  
14 Committee would expect to have the authority to approve and amend them.

15 The request further explains that the PAC Committee would have the complete  
16 authority to administer the SSF, without review or approval by the Special Committee or  
17 by Extendicare's board of directors. That is, it would decide: what individuals among  
18 Extendicare's (and its subsidiaries') work force would be solicited for contributions to the  
19 fund and when to solicit such contributions; to whom to make contributions and when to  
20 make them; and what expenditures to make from the fund and when to make them.

21 According to the request, Extendicare's by-laws presently allow the board to  
22 designate committees, to be comprised of one or more directors. The by-laws provide  
23 that, to the extent permitted by law and provided by the resolution establishing the  
24 committee, the committee shall have and may exercise all of the powers of the board in  
25 the management of the business and affairs of the corporation. The by-laws currently are  
26 silent with respect to whether individuals who are not directors may serve on such  
27 committees.

28 To the extent that Extendicare's board includes U.S. citizens or permanent  
29 resident aliens residing in the United States, it would be anticipated (but not necessarily  
30 foreordained) that all or some of such individuals would be appointed to serve on the

1 Special Committee. However, because the size and composition of the board changes  
2 from time to time, it cannot be predicted in advance whether the board would always  
3 have at least one such individual on it. As a result, in order to assure that a Special  
4 Committee could always be constituted, it is proposed that Extendicare's by-laws would  
5 be specifically amended both to permit the board of directors to appoint the Special  
6 Committee and to provide that such Special Committee may or may not include members  
7 of the board of directors, as the board sees fit. Such an amendment to the by-laws will  
8 require the approval of either Extendicare's board or its shareholders.

9 ***Opinion format***

10 Given this factual background and the described circumstances, Extendicare asks  
11 ten questions concerning the proposal to form and operate a PAC. Questions one through  
12 seven are set forth with some editing of the actual phrasing as used in the request.  
13 Questions eight through ten are substantially revised and consolidated since they present  
14 the same legal issue. To facilitate the Commission's response, the basic statutory and  
15 regulatory provisions are stated initially and then applied to answer each question.

16 ***Act and Commission regulations***

17 The Act and Commission regulations prohibit a foreign national from making a  
18 contribution, directly or through any other person, or an expenditure in connection with  
19 an election to any political office.<sup>3</sup> In addition, it is unlawful to solicit, accept, or receive  
20 a contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR 110.4(a)(1) and (2).  
21 As defined in the Act, the term "person" includes a corporation. 2 U.S.C. §431(11).

22 The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C.  
23 §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1).  
24 Section 611(b) defines a "foreign principal" to include:

- 25 (1) a government of a foreign country and a foreign political party;  
26  
27 (2) a person outside of the United States, unless it is established that such  
28 person is an individual and a citizen of and domiciled within the United

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<sup>3</sup> Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local as well as Federal offices. *United States v. Kanchanalak*, 192 F.3d 1037, 1044 (D.C. Cir. 1999) [concluding that Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory opinion have "consistently interpreted §441e as applicable to federal, state, and local elections since 1976."]

1 States, or that such person is not an individual and is organized under or  
2 created by the laws of the United States or of any State or other place  
3 subject to the jurisdiction of the United States and has its principal place of  
4 business within the United States; and

5  
6 (3) a partnership, association, corporation, organization, or other combi-  
7 nation of persons organized under the laws of or having its principal place  
8 of business in a foreign country.

9  
10 Accordingly, under §611(b)(2) and (3), a corporation organized under the laws of  
11 any State within the United States that has its principal place of business in the United  
12 States is not a foreign principal. Therefore, it follows that such a corporation would not  
13 be a foreign national under 2 U.S.C. §441e. The term "foreign national" also includes an  
14 individual who is not a citizen of the United States and who is not lawfully admitted for  
15 permanent residence in the U.S. as defined by 8 U.S.C. §1101(a)(20). 2 U.S.C.  
16 §441e(b)(2).

17 Commission regulations, at 11 CFR 110.4(a)(1)–(4), implement the foreign  
18 national prohibition, explaining its broad scope and barring foreign national participation  
19 in certain election-related activities:

20 (a) *Contributions or expenditures by foreign nationals.*

21 (1) A foreign national shall not directly or through any other person make a  
22 contribution, or an expenditure, or expressly or impliedly promise to make a  
23 contribution, or an expenditure, in connection with a convention, a caucus, or a  
24 primary, general, special, or runoff election in connection with any local, State, or  
25 Federal public office.

26 (2) No person shall solicit, accept, or receive a contribution as set out above from  
27 a foreign national.

28 (3) A foreign national shall not direct, dictate, control, or directly or indirectly  
29 participate in the decision-making process of any person, such as a corporation,  
30 labor organization, or political committee, with regard to such person's Federal or  
31 nonfederal election-related activities, such as decisions concerning the making of  
32 contributions or expenditures in connection with elections for any local, State, or  
33 Federal office or decisions concerning the administration of a political committee.

34 (4) For purposes of this section, *foreign national* means --

35 (i) A foreign principal, as defined in 22 U.S.C. 611(b); or

36 (ii) An individual who is not a citizen of the United States and who is not lawfully  
37 admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20);

38 (iii) Except that *foreign national* shall not include any individual who is a citizen  
39 of the United States.  
40

The Commission has applied section 110.4(a)(3) in past advisory opinions that considered factual situations and circumstances similar to those presented here. For example, in Advisory Opinion 1995-15, the Commission approved a PAC's operating structure where its sponsoring domestic corporation was about to be acquired by a foreign corporation. The attributes of the PAC's future composition included that all its members and officers would be US citizens. Citing this fact among others, along with prior advisory opinions, the Commission concluded that: "after the company is acquired by a foreign corporation, foreign nationals will not direct, control, or otherwise participate directly or indirectly in the decision-making process of the PAC, including the administration of or contributions by the PAC." Advisory Opinion 1995-15. In other opinions applying the cited regulations, the Commission has emphasized the requirement that foreign nationals, who are either on the corporate board or hold other positions with the corporation, may not vote on the selection of individuals who would operate the PAC or exercise decision-making authority with respect to contributions and expenditures by the PAC, or by the domestic corporation itself in non-federal elections. Advisory Opinions 1992-16, and 1990-8; *see also* Advisory Opinion 1989-29 [same emphasis in opinion issued prior to adoption of 11 CFR 110.4(a)(3) where non-federal PAC was funded with corporate treasury moneys and proposed to make contributions only in non-federal elections subject to State law]. Recently, in Advisory Opinion 1999-28, the Commission indicated that the conclusions and guidance within these opinions have continued relevance to the operations of an SSF established by the United States subsidiary of a foreign national parent corporation. Given the cited regulations as applied in the cited opinions, and subject to the responses to the questions set forth below, Extencicare may establish and function as the connected organization for a PAC.

***Questions and responses***

- (1) Extencicare requests advice as to whether it is necessary to delegate to the Special Committee the decision whether or not to establish a separate segregated fund, and whether it is permissible under the Act for the board to make that decision, provided that it delegates to the Special Committee the authority to select the members of the PAC Committee.
- (2) As long as at least one member of Extencicare's board of directors is a U.S. citizen or a permanent resident alien residing in the United States, would it be

1 permissible if the Special Committee established by the board consisted only of  
2 such director or directors?

- 3  
4 (3) May the board also appoint non-directors to the Special Committee? If so, must  
5 any other members of the Special Committee be board elected officers of  
6 Extendicare? May non-board elected officers be appointed? May non-officer  
7 employees be appointed?  
8

9 The board itself may make the general corporate policy decision to establish an  
10 SSF. However, it must delegate all other decisions, such as personnel selection and  
11 administration of the SSF, to the Special Committee or to some other corporate personnel  
12 group comprised exclusively of United States citizens or individuals lawfully admitted for  
13 permanent residence in the United States. Such a delegation could also be made to one  
14 director, officer or other executive of Extendicare who is not a foreign national. If the  
15 board itself was comprised solely of foreign nationals, this required delegation must give  
16 exclusive power to the delegatee to select the personnel who will be members of the  
17 Special Committee or other similar group.

18 Commission regulations would not bar the board's appointment of non-directors,  
19 non-board elected officers or non-officer employees to the Special Committee, but such  
20 appointments may only be made by those board members who are not foreign nationals.  
21 If, at some future time, there are no US citizen (or permanent resident alien) board  
22 members then an executive officer of Extendicare (who is not a foreign national) would  
23 have to be granted this appointing authority. All such appointees to the Special  
24 Committee are required to be either US citizens or permanent resident aliens in the  
25 United States.

- 26  
27 (4) Regardless of whether or not any members of the board of directors are U.S.  
28 citizens or permanent resident aliens residing in the United States, may the  
29 Special Committee be comprised solely of non-directors?  
30

31 Yes, this is merely a matter of internal corporate policy and practice. As indicated  
32 above, the membership of the Special Committee may not include foreign nationals, and  
33 foreign nationals at the board level or otherwise may not appoint the members of the  
34 Special Committee.  
35



(5) Must members of the Special Committee be appointed for a fixed term, to be replaced by the board only upon the expiration of such term or in the event of a vacancy created by death, departure from Extendicare, etc., or may the members of the Special Committee serve at the pleasure of the board?

Subject to the responses to questions (1) through (4) above, it would not matter whether the members of the Special Committee served for a fixed term or at the pleasure of the board. If desired, the Special Committee could be a self-perpetuating body, subject to the responses above.

(6) Must members of the PAC Committee be appointed for a fixed term, to be replaced by the Special Committee only upon the expiration of such term or in the event of a vacancy created by death, departure from Extendicare, etc., or may members of the PAC Committee serve at the pleasure of the Special Committee?

It makes no difference whether the PAC Committee members are appointed for a fixed term or may serve at the pleasure of the Special Committee. What matters is the foreign national status of any person or body that appoints these personnel and the appointees own status as either US citizens or permanent resident aliens in the United States. The Commission emphasizes that, in addition to complying with §441e, the appointees to the PAC Committee would also have to qualify as executive or administrative personnel of Extendicare or one of its affiliated corporations. 2 U.S.C. §441b(b)(7), 11 CFR 114.1(c).<sup>4</sup>

(7) Must members of the PAC Committee be board-elected officers of Extendicare, or may non-board elected officers, or non-officer employees, be appointed by the Special Committee to the PAC Committee?

Otherwise eligible personnel within any of the stated personnel groups may be appointed to the PAC Committee. They must themselves be US citizens or permanent resident aliens in the United States and may be appointed only by personnel with that same status. See response to question six and footnote 4.

<sup>4</sup> The Commission notes that if Extendicare forms an SSF, the contribution solicitation and other functions of the SSF (and Extendicare to support the SSF) shall comply with 2 U.S.C. §441b(b)(1)-(7) and Commission regulations at 11 CFR Part 114. See, in particular, 11 CFR 114.5; see also Advisory Opinion 1999-28 which discusses the application of the cited SSF regulations in the same context as presented here, the PAC of a USA subsidiary of a foreign parent corporation.

Questions eight through ten generally pose the issue of the extent to which, if at all, the directors or officers of Extendicare who are foreign nationals may exercise control and oversight authority over the PAC Committee (and the PAC ) with respect to personnel and financial matters. With respect to personnel, the request explains that some members of the PAC Committee may be supervised by Extendicare officers and executives who are foreign nationals and who would, in the normal course of their supervisory functions, have authority to make performance evaluations, compensation reviews and other similar personnel decisions pertaining to these PAC personnel. The Extendicare job descriptions for such personnel would not specify duties for the PAC Committee, but those appointed thereto would assume PAC responsibilities as a part of their regular jobs. With respect to financial oversight, the request notes that personnel who will have PAC Committee duties hold positions in corporate departments of Extendicare whose budgets would be affected by the time and other corporate resources attributable to their PAC functions. The board currently reviews and approves the budgets for these departments and would propose to continue that function even if it represents a form of control over the direct or indirect costs paid by Extendicare for the establishment and administration of its PAC.

The Commission responds to questions eight through ten, as summarized above, by applying two discrete sections of its regulations. Namely, §114.5(d) allowing a corporation to exercise control over its SSF, and §110.4(a)(3) barring any foreign national from direction, control or participation in the decision-making process of any person, such as a corporation or political committee with respect to the person's Federal election-related, such as decisions concerning the administration of a political committee.<sup>5</sup> As was indicated in the response to questions one through three, the Extendicare board may make a general corporate policy decision to establish an SSF; it may similarly make a general corporate policy decision to terminate an SSF whose establishment it previously authorized. Those core decisions represent a permissible exercise of corporate control over an SSF by any corporation, including one that, like Extendicare, is owned by a foreign parent corporation or by other foreign nationals.

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<sup>5</sup> An SSF is one type of political committee under Commission regulations. 11 CFR 100.5(b).

Beyond this level of basic corporate control through its governing board, other decisions of Extendicare and its personnel relating to the PAC, including its formation and operating policies, come within the purview of the foreign national prohibition as set forth in §110.4(a)(3). In the context of the circumstances posed in this request, the dual focus of the regulation is significant; it prohibits foreign national participation in the decision-making process concerning a corporation's election-related activities (such as the formation of a PAC) and concerning the administration of a PAC once established. As already indicated in the responses above, this means that foreign national directors of Extendicare must avoid any participation in the formation of the PAC beyond making the basic decision at the corporate board level to authorize the PAC's establishment. Board members and other Extendicare officers or executives who are not foreign nationals must be the only personnel group who take the PAC formation and operating policy development and implementation processes to the next levels. For example, selecting and giving PAC work assignments to personnel who will serve on the Special Committee or PAC Committee must be made only by US citizens or individuals lawfully admitted for permanent residence in the United States. If there is no board member who qualifies as such a person, the board's decision must be limited to only a general delegation of authority to one or more individuals at the officer or executive level, none of whom are foreign nationals. Such persons would then proceed, without oversight or control by the board, with the selection of eligible and qualified personnel to serve on the Special Committee or the PAC Committee.

With respect to the supervision by foreign nationals of other personnel (not foreign nationals) who have functions on the PAC Committee, the Commission concludes that a reasonable approach should be followed that would avert the possibility of arbitrary actions, favorable or unfavorable, by a foreign national supervisor solely on the basis of a subordinate's performance of duties with respect to PAC Committee matters. One permissible policy would be to require that all performance evaluations and compensation reviews (and other similar personnel related actions), to the extent they entail consideration of the PAC functions of personnel who are subordinates of foreign nationals, be based exclusively on the input to the supervisor by the most senior person

1 on the PAC Committee who has direct knowledge of the employee's performance of PAC  
2 functions. Other approaches may also be reasonable. The Commission would not require  
3 that a separate system of supervision and evaluation be established outside the normal  
4 structure of personnel administration within Extendicare.

5 With respect to the board's normal and usual power to review and approve  
6 departmental budgets, the Commission recognizes that the "power of the purse" may  
7 inevitably be asserted in a manner that could curtail, maintain or enhance the level of  
8 corporate support for the PAC; either in terms of personnel using official "company time"  
9 for PAC duties, covering direct or indirect administrative costs associated with PAC  
10 operations, or providing use of corporate equipment and facilities for PAC matters.  
11 (Such support must, of course, comply with 11 CFR 114.1(b) of Commission  
12 regulations.) As indicated above, the Commission also recognizes that the board, having  
13 itself authorized the formation of a PAC or authorized a Special Committee to determine  
14 whether it should establish a PAC, may also make a decision to terminate a PAC at any  
15 time after its formation. Accordingly, the Commission concludes that a reasonable  
16 approach, one which comports with the cited regulation barring foreign national  
17 participation in decisions concerning the administration of a PAC, should be followed.  
18 One reasonable approach would be for the board to approve budget levels for the direct  
19 costs of PAC support merely as a formality, in reliance solely on financial data and other  
20 information provided by the Special Committee or the PAC Committee. Another would  
21 be to set a specific budget level for PAC direct costs at a "not to exceed" amount. The  
22 board's review power (short of a decision to terminate the PAC entirely), should be  
23 limited to ascertaining and enforcing compliance by the Special Committee or the PAC  
24 Committee with the budget levels established by the board in accord with the above  
25 described procedures. Other budget setting and review procedures for the direct costs of  
26 PAC operations may also be reasonable if they assure compliance with Commission  
27 regulations. With respect to the indirect costs to Extendicare for PAC operations, the  
28 usual and normal corporate procedures for budget decisions and review may be followed  
29 and would not be prohibited by Commission regulations.

Sincerely,

Darryl R. Wold  
Chairman

Enclosures (AOs 1999-28, 1995-15, 1992-16, 1990-8, and 1989-29)

